



Ms. Lizzie Blandthorn, Chair
Scrutiny of Acts and Regulations Committee
Parliament House, Spring Street
EAST MELBOURNE VIC 3002

By email: sarc@parliament.vic.gov.au
CC: Nathan.Bunt@parliament.vic.gov.au

Dear Ms. Blandthorn,

Submission on the Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018

The Commission for Children and Young People¹ (the Commission) seeks to contribute to the Scrutiny of Acts and Regulations Committee's (SARC) consideration of the Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018 (the Bill). The Bill was introduced to the Legislative Assembly on 25 July 2018 and proposes to make a number of amendments to the *Criminal Organisations Control Act 2012* (the Principal Act) and *Children, Youth and Families Act 2005* (the CYFA). If passed, the Bill will extend the unlawful association scheme (the scheme) to include children aged 14 to 17 years and abolish de novo appeals.²

SARC performs an important function in considering and reporting on whether Bills introduced into Parliament are compatible with the *Charter of Human Rights and Responsibilities Act 2006* (the Charter). In considering compatibility, SARC is required to consider section 7(2) of the Charter, which outlines the circumstances in which a human right may be limited under law. Section 7(2) provides that limitations on human rights may occur if they are demonstrably justified and there are no less restrictive means for achieving the purpose of the Bill available. Under section 7(2), laws that limit human rights are required to be proportionate and appropriately supported by an evidence base. Importantly, the onus is on government to provide the relevant evidence.

The Statement of Compatibility accompanying the Bill states that its 'purpose' is to 'improve the effectiveness of the unlawful association scheme and make reforms to certain appeal processes'.³ The Second Reading expands upon the purpose of the scheme, stating the amendments are designed 'to ensure that it targets serious and organized crime effectively'.⁴

¹ The Commission is an independent statutory body established to promote continuous improvement in policies and practices relating to the safety and wellbeing of children and young people. We have a particular focus on vulnerable children and young people. Our work includes monitoring and oversight of the child protection, out of home care and youth justice systems and the provision of advice and advocacy to improve services that relate to children and young people. We also have responsibility for administering two new regulatory schemes, the Child Safe Standards and the reportable conduct scheme.

² The term 'children' in this submission refers to children and young people aged 17 years and under.

³ Statement of compatibility (25 July 2018)

http://hansard.parliament.vic.gov.au/search/?LDMS=Y&IW_DATABASE=*&IW_FIELD_ADVANCE_PHRASE=&IW_FIELD_IN_SpeechTitle=Justice+Legislation+Amendment+Unlawful+Association+and+Criminal+Appeals+Bill+2018&IW_FIELD_IN_HOUSENAME=ASSEMBLY&IW_FIELD_IN_ACTIVITYTYPE=Statement+of+compatibility&IW_FIELD_IN_SittingYear=2018&IW_FIELD_IN_SittingMonth=July&IW_FIELD_IN_SittingDay=25

⁴ https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2018/Assembly_Daily_Extract_Wednesday_25_July_2018_from_Book_9.pdf

at page 21.

The Commission makes this submission to SARC to highlight the potential impacts that the Bill's proposed reforms will have on children. In considering the implications of the scheme on children, we have had regard to the findings of a report completed by the NSW Ombudsman, *The consorting law: report on the operation of Part 3A, Division 7 of the Crimes Act 1900*⁵, a three year review of the operation of similar laws in that state. The NSW Ombudsman found that application of such laws to children:

- had no positive effect in terms of reducing or preventing youth crime or serious crime
- had a disproportionate and damaging impact on vulnerable children, including Aboriginal children, children involved with Child Protection and child victims of family violence.

We acknowledge that the Bill proposes a small number of differences to the NSW scheme however; it is our view that these fail to adequately address our concerns about the potential negative impact that laws of this nature may have on vulnerable and marginalised children.

In summary, the Commission submits:

- There are provisions in the Bill that engage significant human rights considerations under the Charter. The Charter rights that are limited include children's right to protection in their best interests⁶, their right to freedom of association⁷, freedom of movement⁸, freedom of expression⁹, recognition and equality before the law¹⁰, protection of families and children¹¹ and privacy.¹²
- The proposed Bill places significant restrictions on the rights of children without cogent evidence to demonstrate justifiable limits contrary to section 7(2).
- In the event the Bill proceeds and the unlawful association scheme is extended to include children, we recommend less restrictive means should be considered to achieve the Bill's purpose.

This submission is structured by reference to the relevant human rights under the Charter that are engaged by the proposed amendments. Included within our submissions are recommendations for amendments intended to achieve the purpose of the Bill, using less restrictive provisions and strengthened safeguards.

1. Right to protection in their best interests

Section 17(2) of the Charter provides that 'every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child'. The best interest principle recognises that children are entitled to special protection due to their age and vulnerability.

The Commission does not believe that the scheme is compatible with a children's right to protection of their best interests for the following reasons:

Criminalisation of children with no offending history

The Commission is disturbed by the potential application of the proposed scheme to children who have no previous criminal record. The scheme creates a new entry point into the

⁵ "The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900 - April 2016" 5 NSW Ombudsman (https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0005/34709/The-consorting-law-report-on-the-operation-of-Part-3A,-Division-7-of-the-Crimes-Act-1900-April-2016.pdf).

⁶ Charter of Human Rights and Responsibilities 2006 (Vic) section 17(2).

⁷ Charter of Human Rights and Responsibilities 2006 (Vic) section 16.

⁸ Charter of Human Rights and Responsibilities 2006 (Vic) section 12.

⁹ Charter of Human Rights and Responsibilities 2006 (Vic) section 15.

¹⁰ Charter of Human Rights and Responsibilities 2006 (Vic) section 8.

¹¹ Charter of Human Rights and Responsibilities 2006 (Vic) section 17(1).

¹² Charter of Human Rights and Responsibilities 2006 (Vic) section 13.

criminal justice system for children with no offending history or conduct beyond the prohibited association.

The report of the NSW Ombudsman confirms that rather than diverting children away from offending, laws of this nature draw vulnerable children further into the criminal justice system.

Given the concerns identified by the Armytage/Ogloff review of youth justice with respect to unacceptably high rates of recidivism among Victorian children who have served a custodial sentence, it is difficult to see how the creation of a new entry point for children as young as 14 into this system will result in reduced offending.

The scheme will not reduce youth offending and will not address serious and organised crime

In 2016, the NSW Ombudsman completed his comprehensive review into the first three years of the operation of the consorting laws. Following extensive consultation and analysis of the NSW Police consorting database, the review found:

*The children and young people subject to the use of the consorting law during the review period fall within the cohort of young offenders for whom use of the consorting law may have counterproductive results and who instead require support to address the underlying causes of their offending if they are to be diverted from continued involvement with the criminal justice system.*¹³

There is no evidence that uses of anti-association laws have reduced rates of offending or reoffending for NSW children and nothing to suggest a different outcome for Victorian children will eventuate.

Similarly, the report of the NSW Ombudsman found that in relation to children, consorting laws were not being used to disrupt gang activity or serious crime.¹⁴

The proposed scheme is likely to have a disproportionate impact on vulnerable children¹⁵

In NSW, anti-consorting legislation has been used to target vulnerable cohorts, including Aboriginal children.

The NSW Ombudsman analysed the police records of half of all children named on the consorting database and found:

- two thirds appeared in police records as victims of family violence
- over three quarters (80%) had been the subject of reports to Child Protection services, with the average number of reports to Child Protection in the cohort being 22 reports per child
- just over one third appeared in police records to have a mental health condition.¹⁶

The NSW Ombudsman also found that 60% of all children who were the subject of a consorting notice identified as Aboriginal.¹⁷ The proposed scheme is likely to have a similar

¹³ "The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900 - April 2016" 5 NSW Ombudsman (https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0005/34709/The-consorting-law-report-on-the-operation-of-Part-3A,-Division-7-of-the-Crimes-Act-1900-April-2016.pdf). p78.

¹⁴ "The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900 - April 2016" 5 NSW Ombudsman (https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0005/34709/The-consorting-law-report-on-the-operation-of-Part-3A,-Division-7-of-the-Crimes-Act-1900-April-2016.pdf). p73.

¹⁵ This submission also engages section 8 of the Charter, recognition of equality before the law.

¹⁶ "The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900 - April 2016" 5 NSW Ombudsman (https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0005/34709/The-consorting-law-report-on-the-operation-of-Part-3A,-Division-7-of-the-Crimes-Act-1900-April-2016.pdf). p78.

¹⁷ "The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900 - April 2016" 5 NSW Ombudsman (https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0005/34709/The-consorting-law-report-on-the-operation-of-Part-3A,-Division-7-of-the-Crimes-Act-1900-April-2016.pdf). p4.

disproportionate impact on Aboriginal children in Victoria, exacerbating their significant over-representation within the criminal justice system.

For the reasons outlined above, the NSW Ombudsman ultimately recommended that consorting laws be amended to preclude their application to children aged 17 years and under.

The proposed safeguards are inadequate

The scheme appropriately defines children as a subset of 'vulnerable persons' who are entitled to a differentiated response from police. However, the safeguards designed to differentiate children as vulnerable persons are undermined in the following ways:

- (i) A person's status as 'vulnerable' does not need to be confirmed by police; with section 124D of the Bill giving senior police officers discretion to form an opinion as to a person's status as vulnerable, without requiring them to make direct enquiries.
- (ii) Section 124FA provides that an unlawful association notice in respect of a vulnerable person that is issued for three years or issued by a police officer of the rank of sergeant (rather than senior sergeant) is *not* invalid for either of those reasons. Section 124FA reduces any incentive for police to observe the proposed safeguards or take steps to confirm whether an individual meets the criteria for vulnerability.
- (iii) The Bill provides that children who are issued a notice under section 124FA may seek internal review of the decision to issue the notice. The internal review processes are identical for both children and adults.

The scheme recognises children are vulnerable and articulates a differentiated approach to the duration of notice and rank of issuing police officer. However, the differentiated approach is seriously undermined by inclusion of sections 124D(2), 124FA and the uniform approach to internal review processes.

The Commission notes that SARC is required to consider and report on rights, freedoms and obligations dependent upon insufficiently defined administrative powers. The Commission submits that the proposed internal review processes are insufficiently defined and therefore unlikely to be utilised by children, particularly those who may be vulnerable and marginalised. In the context of section 124FA, a child's right to have the safeguards available to them applied, rests upon their ability to assert their administrative right to review of a decision to issue a notice.

Based on the above submissions, the Commission invites SARC to consider whether the proposed Bill creates a right to special protection for children that is dependent upon insufficiently defined administrative powers.

Recommendations for change

The following changes to the proposed Bill would reduce the impact of restrictions on children:

- The Bill should require police to ascertain at least a person's age and their cultural background so that a person's vulnerability status is determined prior to issuing of an unlawful association notice.
- We strongly recommend the deletion of section 124FA and inclusion of a new section that confirms unlawful association notices issued to vulnerable persons that do not meet the safeguards required by section 124D are invalid and of no effect from the date of issue.
- The Bill acknowledges that children and young people are vulnerable and require a differentiated approach. It is the Commission's view that the senior police officer

issuing an unlawful association notice to a child be required to read and explain the following information:

- the duration of the unlawful association notice
- their right to seek an internal review
- how to seek an internal review
- the contact details for a youth specific legal service, such as Victoria Legal Aid or Youth Law or in the case of Aboriginal children, the Victorian Aboriginal Legal Service.

Oversight functions of the IBAC could be strengthened by expanding the role of the Commission

Division 4 outlines the oversight and monitoring powers given to the IBAC. It is pleasing to see that section 124U subsection (3)(a) provides the IBAC be required to consult with the Commission in relation to recommendations pertaining to children.

Given the Commission's expertise in matters relating to children, it is appropriate that the IBAC consult with us and we welcome the opportunity to assist the IBAC perform these important functions.

We would submit that there should be a greater role for the Commission in terms of assisting the IBAC, particularly where they are required to consider 'the impact of the exercise of powers' on children and their right to protection in their best interests. In its current form, section 124U subsection (3)(a) restricts our role to commenting on recommendations only, without necessarily having access to information about the broader context.

Recommendations for change

Given the findings of the NSW Ombudsman, it is essential that safeguards included in the Bill operate as intended 'to reduce the risk of similar issues arising with Victoria's laws'.¹⁸ For this reason, the Commission recommends that sections 124R and 124U and 124Y be amended to include a requirement that the IBAC consult with the Commission, particularly with respect to the impact of the scheme upon children and not limited to recommendations only.

To assist the Commission to perform its role for the benefit of the IBAC, we additionally recommend section 124X be amended so that reports from the Chief Commissioner on issued unlawful notices to children are provided to the Commission, in addition to the IBAC.

2. Right to freedom of association (section 16), movement (section 12) and expression (section 15)

Sections 12, 15 and 16 of the Charter provide that every person has the right of peaceful assembly and association others; free movement and expression. The proposed Bill directly affects children's right to associate freely by criminalising the conduct of a child (with or without a criminal record) who associates with convicted offenders, including those aged 17 and under.

The Commission does not believe the Bill includes sufficient safeguards to ensure that these rights are not limited arbitrarily for the following reasons:

The Bill removes the requirement for police to believe there is a connection between association and criminal activity

Section 124D of the existing Principal Act enables a senior police officer to issue an unlawful association notice if the senior police officer 'reasonably believes that ... the individual has, on at least one occasion, associated with an individual convicted of an applicable offence ...

¹⁸ https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2018/Assembly_Jul-Sep_2018_Daily_25_July_2018.pdf at p28.

and the commission of an offence is likely to be prevented if those individuals are prevented from associating with each other'. By including a requirement that the police officer believes that there is a connection between the association and commission of an offence, the existing Principal Act places limits on the ability of police to arbitrarily issue an unlawful association notice.

The proposed Bill includes no such limits. The Bill gives police the power to limit freedom of association even where they do not suspect that the association is linked to any criminal purpose. This could give rise to arbitrary exercise of police power, which is particularly likely to affect vulnerable people who congregate in public spaces, including people who are homeless, children, and Aboriginal people.

Recommendation for change

The Commission recommends that the Bill retain section 124D as provided by the Principal Act at least in relation to children, thereby ensuring any limitation on the right to association of children would be in pursuit of its broader purpose to prevent 'the commission of serious and organised crime'.

Defences are limited and do not include a defence for conduct that was not for an 'ulterior purpose'

The Bill includes a number of defences for association that are not for an 'ulterior purpose', but the defences are only available in limited circumstances.

Circumstances include if 'the named convicted offenders are a relative, spouse or domestic partner of the individual' and the association was not for an ulterior purpose.¹⁹ We note that 'relative' is broadly defined to include 'a person who is a relative under Aboriginal or Torres Strait Islander tradition or contemporary social practice'. The Commission welcomes the inclusion of this broad definition.

However, there is no defence for association with a non-relative and the association was not for an 'ulterior purpose.' In the Commission's view, the defences described in section 124A are narrowly framed to make the limitation on freedom justifiable in relation to the public interest.

Recommendations for change

The Commission submits that there should be a general defence, not limited to family members for any association not intended for an 'ulterior purpose'. This would ensure that the limits on freedom of association would only be abridged in circumstances where police are able to prove they have reasonable cause to suspect that association between children is taking place for an 'ulterior purpose'.

The Commission further recommends that the list of circumstances in which a defence can be raised should be expanded to include the following:

- association that occurs in the course of complying with an order by the Youth Parole Board or with a case plan, direction or recommendation by a member of staff of Youth Justice
- association that occurs in the course of the provision of transitional, crisis or emergency accommodation
- association that occurs in the course of the provision of a welfare or support service
- association in the course of complying with an order, case plan, direction or requirement of the Secretary of the Department of Health and Human Services
- association between two children for a purpose that is not an ulterior purpose.

¹⁹ The Bill, section 124A(3)(a).

Given the disproportionate impact of the NSW laws on children in contact with the child protection system, it is particularly important that children's out of home care arrangements are protected from operation of these laws.

3. Right to privacy (section 13)²⁰

Section 13 of the Charter provides that every person has the right to privacy and not to have his or her reputation unlawfully attacked.

Section 124D(7) of the proposed Bill provides that all unlawful association notices must specify the names of every convicted offender with whom the individual served the notice must not associate. This necessitates police disclosing a child's criminal conviction to persons receiving the unlawful association notice. Depending on how a police officer issues the warning and subsequent notice, other people who are present may also hear information about the fact a child has a conviction for a serious offence.

Disclosure of a child's criminal conviction appears to be at odds with section 534 (3) of the CYFA which provides:

534 (1) A person must not publish or cause to be published ...

(c) except with the permission of the President or of a magistrate under subsection (1A), or of the Secretary:

(3) *any matter that contains any particulars likely to lead to the identification of a child as being the subject of an order made by the Court.*

The CYFA defines 'publish' in accordance with the *Open Court Act 2013*, meaning to 'disseminate or provide access to the public or a section of the public by any means, including by written publication ... public exhibition or electronic communication'.²¹ There are criminal penalties for any breach of section 534.²²

We note that in NSW, the Ombudsman found that although not required by the legislation, their analysis of consorting records found numerous examples of occasions during which police specified the offence of which a child had been convicted.²³

The Commission submits that the intersection between existing legislation, the Bill and the Charter creates two issues in the Victorian context:

- The use of the anti-association law by police to inform a person that a child has a conviction for an offence, may result in a police officer committing an offence under section 534(3) of the CYFA.
- The Bill limits the right to privacy in the Charter in a manner that is disproportionate to its purpose.
- There are no proposed safeguards in the Bill to regulate potential infringements of a child's right to privacy.

Recommendation for change

²⁰ The Commission wishes to draw to the attention of SARC that the Bill may also be contrary to the information privacy principles contained in Schedule 1 of the *Privacy and Data Protection Act*, which limits disclosure of personal information in certain circumstances.

²¹ *Open Court Act 2013*, section 3.

²² CYFA, Section 534, Penalty (a) and (b).

²³ "The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900 - April 2016" 5 NSW Ombudsman (https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0005/34709/The-consorting-law-report-on-the-operation-of-Part-3A,-Division-7-of-the-Crimes-Act-1900-April-2016.pdf). p99-100.

The Bill is amended to include a prohibition on police officers disclosing the details of any indictable offence a child was convicted of when issuing an unlawful association warning, notice or charge.

Conclusion

The Commission welcomes the opportunity to comment on the proposed Bill and contribute to SARC's consideration of the human rights issues raised by the Bill.

The Commission considers that the Bill proposes significant limitations on the Charter rights of Victorian children. For this reason, Parliament needs to carefully review the evidentiary basis for these limits on the rights of children to assess whether they are reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom in accordance with section 7(2).

In our view, the proposed Bill engages a number of human rights of specific relevance to children which are limited in a manner that is unreasonable and unjustifiable on the basis of cogent evidence.

If you have any questions about this submission, please don't hesitate to contact Siobhan Mansfield, Strategic Adviser to the Principal Commissioner on Siobhan.M.Mansfield@ccyp.vic.gov.au.

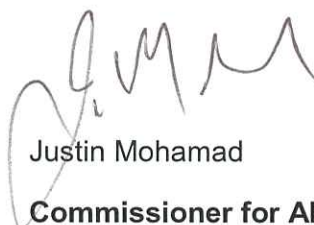
Yours sincerely



Liana Buchanan

Principal Commissioner

6 / 8 / 18



Justin Mohamad

Commissioner for Aboriginal Children

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